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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

Nos. 1104-1105

WILLIAM MILBURN,

Petitioner,

vs.

MARTHA HEALD and ORLAND HEALD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ANSWER OF THE RESPONDENTS TO THE PETITION FOR WRIT OF CERTIORARI.

JOSEPH D. RYAN,

Counsel for Respondents.

CHAMPLIN-REHALY COMPANY, CHICAGO 265

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THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals in this case was filed January 13, 1942, appears as *Heald* v. *Milburn*, 125 Fed. (2) 8, and is set out in the Record herein, beginning at page 392.

STATEMENT OF THE CASE.

The pleadings are set out rather fully in the Petition, pages 2 and 3. As we understand it, however, there is no point on the pleadings; we will refrain from discussing them.

Petitioner, a used-car dealer, had been out all morning going from one automobile sales yard to another; during his morning's travels he had done considerable drinking and by 2:15 p. m., the time of the accident, he was definitely intoxicated. He was driving an old secondhand car, which had been submitted to a superficial examination by a mechanic in his employ (Tr. 243); apparently, since no radical defects appeared to the casual glance and the car could be run three or four miles, it had passed the test, and thenceforth could be operated at will. The mechanic testified that the defect which was evident when the car collided with respondents' car could have been discovered at the time of his examination, if he had taken the trouble to remove a wheel, but since "by the time you stop and do that to several hundred cars during the year it means a lot of time" (Tr. 246), nothing of the kind was attempted and petitioner used the car, knowing nothing about its condition except that it was able to run (Tr. 191, 192).

Not long prior to the accident, the petitioner's attention was attracted to a noise in his car; he stopped at a used-car yard and had the nuts on the left wheel tightened. He started to do the work himself, but let a mechanic finish it for him (Tr. 183, 184). He stood right beside the man while the work was done and watched him do it (Tr. 194).

It was proved initially by the respondents (Tr. 108, 109) and later admitted by the petitioner that the nuts which fitted on the hub bolts were "all worn off" (Tr. 245) and so small that they permitted the wheel to fly off (Tr. 165), leaving the nuts on the hub (Tr. 245). The nuts, perforce, must have been smaller than the holes over which they were applied (Tr. 156). If they were so much smaller that they would pull through the holes without damage, this unsafe condition must have been apparent to the mechanic who was tightening them; yet neither the mechanic (Tr. 155, 156) nor the petitioner (Tr. 195, 196) would admit discovering anything amiss, although, according to their testimony, they were working on the identical wheel a few hours before the accident. The petitioner testified that he didn't even look to see (Tr. 195, 196).

Petitioner asserts, page 6, that: "When the two cars were about seventy-five to eighty feet apart, the rear end of the Milburn car suddenly dropped and in the same instant the car veered south of the center line toward the Heald car." Petitioner seeks to convey the impression that the foregoing facts are undisputed, since he makes no mention of any proof to the contrary. The fact is, however, that the foregoing testimony was absolutely and flatly contradicted by respondent Orland Heald (Tr. 146), who swore positively that the rear of the Milburn car did not drop prior to the accident. Even the petitioner qualified his story by saying that: "The back end of the car fell, apparently, and after that I don't know what happened" (Tr. 186).

The best that can be said for petitioner is that the testimony on this point was in conflict; the jury believed respondent. Their decision on this question of fact should not be disturbed.

Even had the jury reached the conclusion that this insecurely attached wheel became wobbly or out of alignment, thereby causing the car to sway and run onto respondents' side of the road, petitioner would still be liable under the undisputed evidence. He admitted that he knew nothing at all about the condition of the car (Tr. 191, 192) and that after he became aware that it was unsafe and that he heard a rattle in the wheel, as he reported to one of his witnesses (Tr. 158), he didn't take the trouble to look at the wheel while it was being repaired (Tr. 195, 196). Had he done so and had he been sober at the time, he could not have failed to observe that it was in a dangerous and unsafe condition for use on the public highway.

The cause of this accident was the drunken condition of the petitioner. The accident happened on respondents' side of the road and petitioner, in driving his car on the wrong side of the center line, was where he had no business to be. He was profanely and abusively drunk. He was staggering, his eyes were bloodshot, he boasted that he was drunk (Tr. 20). He was talkative, silly; his face was flushed and he was unable to walk without staggering (Tr. 42). He admitted having had seven drinks of whiskey (Tr. 31). He started to swear and refuse to state his name (itself a violation of Illinois law); he got out of his car, looked at it, got back in, said: "Sure I can get out," started the motor and raced it "sky high" and all this when his car lacked one wheel and was in the condition shown by Deft. Ex. 1, Tr. 349. He talked incoherently, said that he was drunk, that he was going to die, and wound up with the request that he be killed (Tr. 85). He asked Orland Heald who had hit him; he said he was drunk for the first time in years; he boasted of the standing and connection of his wife in the churches in the neigh-

boring town of DeKalb; he produced his wallet and offered it to respondent to pay the damages (Tr. 124). His drunken condition was testified to by a police officer (Tr. 20), a deputy sheriff (Tr. 31), a physician (Tr. 41), a farmer's wife (Tr. 77), a farmer (Tr. 85), as well as the respondent Orland Heald (Tr. 124).

He was arrested for drunken driving, but the charge was later nolle prossed (Tr. 207).

GROUNDS FOR JURISDICTION.

This is not a case of public importance. It does not involve a federal statute. There was no departure by the Circuit Court of Appeals from the "accepted and usual course of judicial procedure." Nor was the decision of that court in conflict with applicable local decisions. On the contrary, that court strictly followed and applied the Illinois statutes and decisions.

ARGUMENT.

I.

OUR REMARKS TO THE JURY WERE LEGITIMATE COMMENT ON THE EVIDENCE AND THE ISSUES. THE TRIAL COURT OVERRULED OBJECTIONS TO THEM; ITS ACTION IS NOT SUBJECT TO REVIEW EXCEPT FOR GROSS ABUSE OF DISCRETION, WHICH IS NOT CHARGED HERE.

Petitioner asserts that his rights were prejudiced, and irreparable error was committed, by certain excerpts from our argument to the jury.

We called the defense "dishonest, miserable, unfair and untrue." We went further and called the defense a lie.

Our characterization of the defense was apt, though perhaps not pleasant for petitioner to hear. If there was one fact in the case which was abundantly, overwhelmingly proved, it was that petitioner was drunk when he ran into respondents' car. As we have seen, this fact was proved by five wholly disinterested witnesses. At the time of the accident it was freely admitted by the petitioner (Tr. 20, 31, 42, 85, 124). At the time of the trial, however, he apparently thought better of it and completely changed his attitude, since we find him offering the specious objection to proof of his intoxication that the issue was not raised by the pleadings (Tr. 13-15). His argument in this connection was so farfetched that the trial court was impelled to ask him: "Are you really serious?" (Tr. 15). To cap the climax, petitioner a little later objected to this line of proof on the ground that he was "taken by surprise" (Tr. 29).

Under Illinois law, which is controlling in this case, evidence of drunkenness is admissible and material on the question of liability.

In *Reed* v. *Alton Water Co.*, 301 Ill. App. 219, plaintiff was a passenger in the car of a man who was intoxicated, behaved much in the same manner as the instant petitioner, and was taken to jail and locked up until morning. In affirming a judgment for the defendant, the court held, page 223, that whether the driver was under the influence of liquor was a fair question for the jury. After reciting the various evidences of intoxication, the court said, page 223:

> "All these various circumstances constituted abundant proof to justify the jury in finding that Hewey was drunk at the time of the accident."

Similarly, in the case of *Besserman* v. *Hines*, 219 Ill. App. 606, the court held that intoxication, both on the part of the plaintiff's decedent and of the driver of the machine in which he was riding, constituted negligence as a matter of law and reversed a judgment for plaintiff with a finding of fact that his decedent was guilty of contributory negligence.

Petitioner's "respectable authority," for the proposition that drunkenness should not enter into the case and does not impose liability in the absence of negligence, does not embrace any Illinois cases. The Illinois law is as indicated in the two cases above cited. The following cases from other jurisdictions hold that drunkenness is a material factor on the question of negligence and may be considered along with other circumstances in detemining the issue: *People* v. *Townsend*, 214 Mich. 267, 183 N. W. 177; *Southern Traction Co.* v. *Kirksey*, 222 S. W. 702 (Tex. Civ. App.); *State* v. *Kline*, 168 Minn. 263, 209

N. W. 881; *Bray-Robinson Co.* v. *Higgins,* 210 Ky. 432, 276 S. W. 129; *Steinkrause* v. *Eckstein,* 170 Wisc. 487, 175 N. W. 988; *Peveto* v. *Smith,* 113 S. W. (2d) 216 (Tex. Civ. App.).

Several of the cases cited by petitioner announce the same doctrine, notably *Wise* v. *Schneider,* 205 Ala. 537, 88 So. 662, 663; *St. Louis S. F. & T. Ry. Co.* v. *Morgan,* 220 S. W. 281, 282; and *Powell* v. *Berry,* 145 Ga. 696, 699.

We do not propose to analyze the evidence, or to discuss the nature and extent of respondents' injuries. All these questions have been settled by the courts below. We do not even care to comment on the fairness of petitioner in asserting in this court (Pet. p. 19) that our argument did not contain various things which he points out. Petitioner did not print our argument, except in two isolated parts, nor did he make this attack on it in the court below.

We said that the defense of sobriety was unfair and untrue. Our evidence proved exactly that. But this was not the only part of the defense which merited such condemnation.

Petitioner claimed that he was taken by surprise when we proved his intoxication (Tr. 24); this position assumed by petitioner was one which the trial court itself could not believe was serious (Tr. 15).

Petitioner asserted, as a part of his defense, that our cross-examination of one of his witnesses was purposely kept inaudible, so it could not be heard by the jury (Tr. 293).

Petitioner charged that we failed to produce one witness, Mrs. Jackson, who had been in our office with other witnesses, because she would not testify that petitioner was drunk (Tr. 292).

Petitioner said that respondent Orland Heald, who was a court reporter in Nebraska, had "seen more plaintiffs walk out with more money wearing crutches than plaintiffs who walked in without crutches" (Tr. 293).

We submit that the foregoing trivia, all taken from the record in this case, are something that should find no part in any lawsuit. When a defendant seeks to hide behind them, we submit that his defense is false and untrue and justly merits that characterization.

We might add that our reference to "a little lady from a sister state" (Pet. p. 12) was in reply to the obvious attempt by petitioner to arouse sectional prejudice, when he made the derogatory remarks above quoted about respondent Orland Heald, who was a court reporter "out there in Nebraska" (Tr. 293). Litigants are entitled to the same measure of justice, whether coming from Nebraska or Illinois.

Our remarks were fair comment on the issues, and we were entirely within our rights in arguing as we did. The trial court overruled petitioner's objection, and sustained our right to discuss the evidence and draw our conclusions. The courts have always accorded to litigants the right to the fullest discussion of the facts. In *Commonwealth Electric Co.* v. *Rose*, 214 Ill. 545, the court said, pp. 561, 562:

> "Counsel may arraign the conduct of the parties, and impugn, excuse, justify, or condemn motives, so far as they are developed in evidence, or assail the credibility of witnesses when it is impeached by direct evidence, or by inconsistency, or incoherency of their testimony, their manner of testifying, their appearance upon the stand, or by circumstances. 'He may argue such conclusions from the testimony as he pleases, provided he does not misquote witnesses.' (2 Ency. of Pl. & Pr. p. 716). It has been said: 'Just and fierce invective, when based upon the facts in evi-

dence and all legitimate inferences therefrom, is not discountenanced by the courts.' (2 *id.* p. 747)."

In *North American Restaurant* v. *McElligott,* 227 Ill. 317, the following expression is used, p. 327:

> "Much complaint is made of statements of counsel for appellee in his argument to the jury. He characterized the defense that the wrong restaurant company had been sued as a fake and fraudulent one. Counsel must be permitted to draw such deductions from the evidence as are within reason, and we see nothing improper in what was said."

Nor is the federal rule at all different. In *Malone* v. *United States,* 94 Fed. (2) 281, the court said, p. 288:

> "Counsel have a right to make any argument based upon evidence proven in the case, or which may be reasonably inferred therefrom, and to make reply to that made by opposing counsel, and, in doing so, statements may be made which otherwise would be improper."

In *Chicago U. T. Co.* v. *O'Brien,* 219 Ill. 303, 307, the court upheld the right of counsel,

> ". . . to denounce a witness as unreliable or untruthful when subjected to any of the tests for determining his credibility."

In *Goldstein* v. *Smiley,* 168 Ill. 438, the court observed, p. 444, that "counsel cannot be put into a straight-jacket when making their arguments."

To the same effect are:

North Chicago St. R. R. Co. v. Anderson, 176 Ill. 635, 637.

Chicago City Ry. Co. v. Bruley, 215 Ill. 464, 468.

North Chicago St. Ry. Co. v. Cotton, 140 Ill. 486, 502, 503.

West Chicago St. R. R. Co. v. *Annis,* 165 Ill. 475, 478, 479.

Petitioner cites several cases, which we will not discuss in detail. The facts are in no sense parallel, and the decisions are not helpful here. The cases which we have cited are controlling; the entire matter was within the discretion of the trial judge; and his approval of the verdict should dispose of the question.

In discussing the case of *New York Central Railway Co.* v. *Johnson,* 279 U. S. 310 (a case which bears not the most remote resemblance to this case) petitioner seeks to make it appear that he was denied the right to be heard "in a dispassionate manner according to established rules of law and procedure." Petitioner was accorded that right. He was given every opportunity to make his defense, although his method of defense was so far from "established rules of law and procedure" as to evoke from the court the inquiry whether he was serious in the point he attempted to make. Having put in his defense, it was our privilege to comment on it.

II.

THE SUBJECT OF PETITIONER'S PROSECUTION FOR DRUNKEN DRIVING WAS OPENED UP BY THE PETITIONER HIMSELF. HE CANNOT COMPLAIN THAT THIS TESTIMONY WAS INCOMPETENT, SINCE HE OPENED THE DOOR FOR IT.

There can be no serious controversy over the fact that the petitioner was drunk at the time of the accident. His condition of intoxication was described by a police officer, a deputy sheriff, a physician, a farmer who lived nearby, and a woman passerby, as well as the respondent, Orland Heald. The deputy sheriff and the physician saw him in the jail, immediately after the accident (Tr. 30, 31, 41, 42). We were entitled to the testimony of these witnesses be-

cause the petitioner denied that he was drunk; the testimony of the officer to whom he confessed that he had had seven drinks of whiskey (Tr. 31), and of the doctor who examined him professionally, and to whom he also admitted that he had too many drinks (Tr. 42), was important on that issue. The place where these conversations and examinations took place was a necessary part of the testimony; the jury were entitled to know when, where, how and under what circumstances these people acquired their knowledge of petitioner's condition.

It was obvious, of course, that if these people saw him in jail, he was taken there because of his intoxication. While the fact of his arrest is something which may well be galling to the petitioner, and which he would prefer to have forgotten, it was a necessary sequel to and part of the circumstances of the accident; the petitioner himself is entirely and solely responsible for it.

When we inquired of officer Smith what action he took about the petitioner's condition, an objection was immediately interposed and sustained by the court (Tr. 20, 21).

Petitioner, however, was not satisfied to let well enough alone. When cross-examining deputy sheriff Crawford, he sought to show that the witness never testified in any other proceeding that the petitioner was drunk (Tr. 32). This, of course, opened up the subject of other proceedings, and on our re-direct we inquired of the witness whether he was called as a witness in the other proceeding. Petitioner then sought to show by this witness that he was acquitted of the charge of drunken driving, and promised to bring in the record of the criminal proceeding (Tr. 33). Thus it is clear that the criminal proceeding, about which complaint is now made, was injected into the case by the petitioner himself.

Apparently the petitioner was not greatly concerned over this collateral issue during the trial, since he permitted his witness Keefer to be cross-examined on the subject without making any objection (Tr. 177, 178), he testified himself on his direct examination (Tr. 188, 189), and finally he produced the deputy county clerk with what purported to be the original record of the criminal proceedings (Tr. 206 *et seq.*).

The court will remember that we claimed the petitioner was drunk. He denied this charge. We proved it by a number of witnesses who saw him in jail immediately after the accident. The petitioner then, of his own volition, brought the criminal proceedings into the case; he cannot complain of his own act.

In *Reed* v. *Alton Water Co.*, 301 Ill. App. 219, it appeared that the driver of the automobile was drunk, was brought to the police station, that he was locked up until morning. The court held that (p. 223):

> "All these various circumstances constituted abundant proof to justify the jury in finding that Henry was drunk at the time of the accident."

In *Nelson Construction Co.* v. *Industrial Com.*, 286 Ill. 632, 637, plaintiff, after having procured from the court a ruling that certain testimony was inadmissible, brought out the same facts in her own examination of the witnesses. It was claimed, on appeal, that the evidence was incompetent, but the court held that plaintiff was in no position to complain, since it was in the case through her own act.

In *Kortylak* v. *Johnston City B. & L. Assn.*, 279 Ill. App. 88, it was held, p. 91:

> "Where a party offers similar testimony to that to which it objected when offered by the opposing party, it is in no position to claim error, as a party cannot

complain of an error which it also committed; as held in *Bogart* v. *Brazee,* 331 Ill. 160, 181; *Supolski* v. *Ferguson & Lange Foundry Co.,* 272 Ill. 82, 89; *Kuhn* v. *Eppstein,* 239 Ill. 555; *Huling* v. *Century Publishing & Engraving Co.,* 108 Ill. App. 549. And for the reason as stated in *Kuhn* v. *Eppstein, supra:* 'If the evidence for the appellee was incompetent, so was that for the appellants, and they ought not to be heard to complain that evidence of the same character which they offered was not competent.' "

To the same effect, see:

Illinois Steel Co. v. Wierzbicky, 206 Ill. 201, 207.
Armstrong v. C. & W. I. R. Co., 263 Ill. App. 126, 144.
Heine v. Degen, 362 Ill. 357, 376.
Bogart v. *Brazee,* 331 Ill. 160, 181.
Jones v. *Sanitary District,* 265 Ill. 98, 102.

Petitioner cites the case of *Chicago City Railway Company* v. *Uhter,* 212 Ill. 174, as authority for his argument under this heading. The distinctions between the *Uhter* case and the present case are obvious. The court in the *Uhter* case held that evidence of the arrest of defendant's servants was inadmissible because there was no wilful and wanton charge in the declaration. In the instant complaint, Count II was based on wilful and wanton misconduct of the petitioner. Furthermore, in the *Uhter* case the court intimated, p. 183, that the verdict was so large that the jury might have awarded punitive damages. In the instant case the damages are meager compensation for the injuries involved and no claim that they were too large or that they were punitive in their nature was made either in the lower courts or here.

Furthermore, in the *Uhter* case the evidence of the arrest of the street car crew was a direct intimation that they

were guilty of negligence, the ultimate issue which the jury were called upon to determine. In the instant case, the fact that petitioner was arrested for drunkenness would not, of itself, prove the facts at issue in this suit, since the petitioner might have been drunk and still not be guilty of negligence, as is strenuously urged by him under Point I.

What would have been the inference arising in the minds of the jurors, had we shown by the police officers that the petitioner was drunk, but had omitted to show that the witnesses, as officers of the law, had taken any action? Would not the jury have been justified in doubting their testimony, because they failed to do their duty? Was not the act of the officer, in arresting the petitioner, part of the *res gestae,* and did it not show his good faith, and corroborate his testimony that the petitioner was drunk?

Petitioner also cites the case of *Cammarano* v. *Gimino,* 234 Ill. App. 556, which he asserts is authority for the proposition that evidence of the petitioner's arrest cannot be introduced under a wilful and wanton charge. Aside from the very apparent reason that the Illinois Supreme Court has decided otherwise and the Appellate Court cannot overrule the Supreme Court, we wish to point out that in the *Cammarano* case the question of whether evidence of the arrest of the defendant was admissible in a civil proceeding, was not involved. In that case, the plaintiff attempted to prove by the criminal record that the defendant was convicted of a crime. The court held that this could not be done because the criminal record was not evidence in a civil suit of the truth of the charges on which the prosecution was based. That has nothing to do with the proposition of whether a witness can state that when he saw the petitioner in jail, the latter was intoxicated. The

offer of the criminal court record in this proceeding came from the petitioner and not from the respondents. The record which was offered in this case disclosed a *nolle pros*, not a conviction.

In the case of *Chicago City Railway Co.* v. *Reddick*, 139 Ill. App. 160, the court held, p. 171, as follows:

> "While it was not error to prove the arrest of the motorman at the time of the accident, it became error to refuse to permit evidence to be given as to the cause and reason of such arrest."

We submit that the question decided in the *Reddick* case is the precise point at issue here; that this point was not touched upon in the *Cammarano* case cited by the petitioner, and that the only authority directly in point is the *Reddick* and *Uhter* cases, which hold evidence of the defendant's arrest admissible.

The judgment in this case is amply sustained by the evidence. No substantial error was committed on the trial. We urge that the petition for writ of certiorari be denied.

Respectfully submitted,

JOSEPH D. RYAN,
Counsel for Respondents.